

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON

December 14, 2009 Session

**REGINA DAY v. ZURICH AMERICAN INSURANCE**

**Appeal from the Chancery Court for Madison County**

**No. 65767 James F. Butler, Chancellor**

---

**No. W2009-01349-WC-R3-WC - Mailed March 1, 2010; Filed March 31, 2010**

---

In this workers' compensation action, the employee, Regina Day, sustained compensable injuries to both of her shoulders. She returned to her pre-injury job, but the holding company which owned her employer had been sold to another entity. The employer, which had been a corporation, became a limited liability company (LLC). The trial court, applying existing case law, held that she had not returned to work for her pre-injury employer and awarded permanent partial disability benefits in excess of the statutory cap contained in Tennessee Code Annotated section 50-6-241(d)(1)(A). Her employer has appealed, contending that the trial court erred by failing to apply the cap or, in the alternative, that the award is excessive.<sup>1</sup> We affirm the judgment.

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Chancery Court Affirmed**

DONALD P. HARRIS, SR. J., delivered the opinion of the Court, in which CORNELIA A. CLARK, J., and DAVID R. FARMER, SP. J., joined.

William B. Walk, Jr., Memphis, Tennessee, for the appellant, Zurich American Insurance Company.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Regina Day.

---

<sup>1</sup>Pursuant to Tennessee Supreme Court Rule 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

## MEMORANDUM OPINION

### Factual and Procedural Background

Regina Day sustained two compensable injuries. The first was a gradual injury to her left shoulder, with a stipulated injury date of October 4, 2006. This injury required surgical treatment, which was performed by Dr. Harold Antwine, an orthopaedic surgeon, on December 12, 2006. In January 2007, before she fully recovered from that procedure, she returned to work in a light duty status. On February 2, 2007, she slipped and fell at work, injuring her right shoulder. Dr. Antwine performed a surgical repair of that injury on March 27, 2007.

Ms. Day worked in a food processing plant in Jackson. Her job, both before and after her injuries, was to oversee the operation of a machine which made pancakes. Her employer on the dates of both injuries was Pinnacle Foods Group, Inc. (PFG, Inc.). Until early April 2007, PFG, Inc. was wholly owned by a privately-held holding company known as Crunch Holding Corporation (Crunch). In April 2007, Crunch was acquired by the Blackstone Group, a private equity investment organization. After the acquisition, PFG, Inc. was merged with another subsidiary of Crunch to form PFG, LLC. PFG, LLC maintained the same federal tax identification number as PFG, Inc.

The transaction had no discernible effect on Ms. Day's work situation. After recovering from the second injury, she returned to work at the same location, at the same job, and at the same rate of pay. She was paid by PFG, LLC. Although her physician, Dr. Harold M. Antwine III, placed permanent work restrictions on her activities, her job required minimal physical exertion so that little or no accommodation was required.

Dr. Antwine testified that Ms. Day sustained a work-related torn rotator cuff tendon in her left shoulder which was surgically repaired. Ms. Day had a very good result from her left shoulder surgery, with little loss in range of motion and few residual symptoms. Dr. Antwine placed no restrictions on her activities from that injury. He testified that the right shoulder injury was more serious. An MRI revealed it to be a full thickness tear of the rotator cuff tendon with retraction or pulling away from where it attached to the bone. Dr. Antwine also performed an open rotator cuff repair to the right shoulder but the result was not as positive as the left. Her range of motion was limited and, based upon a functional capacity evaluation, Dr. Antwine placed permanent restrictions on the use of her right shoulder. The restrictions included a fifteen-pound lifting limit, no repetitive heavy gripping, no work above shoulder level and no forceful motion of her right arm. Dr. Antwine testified that Ms. Day retained 10% anatomical impairment to the body as a whole as a result of her right shoulder injury. At the time of his deposition, he had not calculated an impairment for the left shoulder injury. An unsigned note containing the rating was made a late-filed exhibit to his deposition indicating that he assigned an impairment of 1% for the left shoulder injury.

Dr. Apurva Dalal, an orthopaedic surgeon, examined Ms. Day on October 23, 2007 at the request of her attorney. Dr. Dalal testified that Ms. Day retained impairments of 13% to the body as a whole for the right shoulder, and 8% to the body as a whole for the left shoulder. The

impairment rating for the right shoulder included 3% to the body as a whole for a distal clavicle excision. Ms. Day had not undergone that procedure, but Dr. Dalal recommended it. He testified that there were anatomical abnormalities in her shoulder that would continue to give her problems unless they were surgically corrected. He agreed with a recommendation contained in the record of Dr. Daniel Yakin that Ms. Day have additional surgical procedures. Dr. Yakin's note was placed in evidence by stipulation of the parties. Dr. Dalal testified that the proposed procedures would improve the function of the right shoulder, but would also result in an increased impairment of 8% to the body as a whole.<sup>2</sup>

Ms. Day was sixty-four years old at the time of trial. She was a high school graduate and had worked for PFG, Inc., its predecessors and successors, for a total of thirty-eight years. She testified that she intended to retire at age sixty-six, but was considering an earlier retirement due to her shoulders. At the time of the trial, she continued to work in the same position which she had held prior to her injury. She testified that she had few residual problems with her left shoulder, but many problems with her right shoulder. She reported that she cannot lift her right arm, is unable to reach over her head, and cannot comb or wash her hair. She has difficulty performing household chores, and, occasionally, pain from the shoulder interferes with her sleep.

The trial court issued its decision in the form of a letter to counsel. Applying Barnett v. Milan Seating Sys., 215 S.W.3d 828 (Tenn. 2007), and Perrin v. Gaylord Entm't Co., 120 S.W.3d 823 (Tenn. 2003), it found that, as a result of the acquisition of Crunch by Blackstone Group, Ms. Day was no longer employed by her pre-injury employer and that her award of benefits was therefore not capped by Tennessee Code Annotated section 50-6-241(d)(1)(A) (2008 & Supp. 2009). It adopted Dr. Antwine's impairment rating of 10% for the right shoulder, and Dr. Dalal's impairment rating of 8% for the left shoulder. It awarded a total of 60% permanent partial disability to the body as a whole, apportioned 20% for the left shoulder and 40% for the right shoulder. The employer has appealed, contending that the trial court erred by failing to apply the one and one-half times impairment cap contained in Tennessee Code Annotated section 50-6-241(d)(1)(A). In the alternative, the employer argues that the award is excessive

### **Standard of Review**

The standard of review of issues of fact is de novo upon the record of the trial court accompanied by a presumption of correctness of the findings, unless the preponderance of evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2) (2008). When credibility and weight to be given testimony are involved, considerable deference is given to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002). Where the issues involve expert medical testimony that is contained in the record by deposition, determination of the weight and credibility

---

<sup>2</sup>Dr. Dalal expressed the additional impairment as 14% to the right upper extremity. This converts to 8% to the body as a whole according to the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, 439 tbl. 16-3, that was an exhibit to his deposition.

of the evidence necessarily must be drawn from the contents of the depositions, and the reviewing court may draw its own conclusions with regard to those issues. Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709, 712 (Tenn. 1997); Elmore v. Travelers Ins. Co., 824 S.W.2d 541, 544 (Tenn. 1992). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin, 120 S.W.3d at 826; Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

## Analysis

### *1. Application of the Caps*

All parties, and the trial court, considered this case to be controlled by Perrin. In that case, the Supreme Court held that purchase of a pre-injury employer by another corporate entity was a “loss of employment” for purposes of section 50-6-241, which triggered the one year period to petition for reconsideration of a capped settlement or award. Perrin, 120 S.W.3d at 827. In Barnett, the Court was asked to reconsider and overrule Perrin. Barnett, 215 S.W.3d at 833. In declining to do so, the Court observed that the General Assembly had amended section 241 after Perrin was decided, but had chosen not to change the language relied upon in that decision. Id. In 2009, the General Assembly enacted Public Chapter 364,<sup>3</sup> which amends section 50-6-241(d), essentially abrogating Perrin and Barnett. The amendments became effective July 1, 2009. PFG, LLC argues that, since the legislature has now acted, the rationale of Barnett should be applied here, and the Supreme Court should overrule those cases. Obviously, it is not within the power of this panel to do so. Moreover, we note that Public Chapter 364, by its terms, applies to “injuries occurring on or after July 1, 2009.” The new law not only reverses the effects of Perrin and Barnett for injuries occurring after that date, but also provides that the successor employer is liable for any additional benefits to which the employee may become entitled upon a reconsideration of disability if the employment is terminated within 400 weeks. The primary rule governing the judicial construction of any statute is to ascertain and give effect to the legislature's intent. Hayes v. Gibson County, 288 S.W.3d 334, 337 (Tenn. 2009). In this case, the legislature's intent regarding retrospective application of the amendments is explicit and clear. The changes to the workers' compensation statute made by Public Chapter 364 are not applicable to this injury.

### *2. Excessive Award*

PFG, LLC also contends that the award is excessive. It points particularly to Ms. Day's deposition testimony that she had “no trouble” with her left shoulder and no great difficulty in performing her job. At trial, Ms. Day testified that she did have occasional problems with the left shoulder, and that a particular function of her job caused pain. In addition, PFG, LLC asserts that Dr. Dalal's impairment ratings were suspect, because he included pre-existing conditions and surgical procedures which had not occurred in his assessment. In that regard, we note that the trial

---

<sup>3</sup>The full text of Public Chapter 364 is attached as an appendix to this opinion.

court explicitly adopted Dr. Dalal's rating for the left shoulder only, choosing to rely upon Dr. Antwine's rating for the right shoulder.

Ms. Day was sixty-four years old when the trial occurred. For the thirty-eight years preceding the trial, she performed relatively unskilled work for, essentially, a single employer. She testified that she continued to have ongoing right shoulder problems, such that she may find it necessary to retire earlier than she had previously intended. The trial court obviously found her testimony credible. Both Dr. Antwine and Dr. Dalal recommended that she seek other employment because of the demands of her job. Viewing the record as a whole, we are unable to conclude that the evidence preponderates against the trial court's assessment of her permanent disability.

### **Conclusion**

The judgment of the trial court is affirmed. Costs are taxed to Zurich American Insurance Company, and its surety, for which execution may issue if necessary.

---

DONALD P. HARRIS, SENIOR JUDGE

## APPENDIX

AN ACT to amend Tennessee Code Annotated, Title 50 and Title 56, relative to workers' compensation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 50-6-241(d)(1), is amended by adding the following as a new subdivision (C):

(C)(i) Notwithstanding any other law to the contrary, for injuries occurring on or after July 1, 2009, if an injured employee receives permanent partial disability benefits for body as a whole injuries, or if the injured employee receives permanent partial disability benefits for schedule member injuries, pursuant to subdivision (d)(1)(A) and the pre-injury employer is sold or acquired subsequent to the receipt of such permanent partial disability benefits, then the injured employee shall not be entitled to seek reconsideration:

(a) Provided the injured employee continues to be employed by the successor employer at the same or higher pay; or

(b) If employee declines an offer of employment with the successor employer at the same or higher pay.

(ii) Notwithstanding subdivision (i), an injured employee shall be entitled to seek reconsideration:

(a) From the successor employer within four hundred (400) weeks of the day the employee returned to work for the pre-injury employer, if the injured employee received permanent partial disability benefits for body as a whole injuries from the pre-injury employer pursuant to subdivision (d)(1)(A) and the injured employee is no longer employed by the successor employer at the same or higher pay; or

(b) From the successor employer within the number of weeks for which the employee was eligible to receive benefits from the pre-injury employer under § 50-6-207, to be calculated from the day the employee returned to work for the pre-injury employer, if the injured employee received permanent partial disability benefits for schedule member injuries from the pre-injury employer pursuant to subdivision (d)(1)(A) and the injured employee is no longer employed by the successor employer at the same or higher pay.

(iii) Any additional permanent partial disability benefits to which the injured employee is entitled pursuant to subdivision (C)(ii) shall be paid by the successor employer or the insurance carrier for the successor employer.

(iv) If an injured employee is entitled to seek reconsideration pursuant to this subdivision (C), then the employee shall first request a benefit review conference within one (1) year of the date on which the employee ceased to be employed by the successor employer. If the parties are not able to reach an agreement regarding additional permanent partial disability benefits at the benefit review conference, then the employee shall be entitled to file a complaint against the successor employer seeking reconsideration in a court of competent jurisdiction within ninety (90) days of the date of the benefit review conference. Any settlement or award of additional permanent partial disability benefits pursuant to reconsideration shall give the successor employer credit for the prior permanent partial disability benefits paid by the pre-injury employer to the employee. Any new settlement or award regarding additional permanent partial disability benefits shall be subject to the maximum established in subdivision (d)(2).

SECTION 2. This act shall take effect July 1, 2009, the public welfare requiring it.

IN THE SUPREME COURT OF TENNESSEE  
SPECIAL WORKERS' COMPENSATION APPEALS PANEL  
AT JACKSON

**REGINA DAY v. ZURICH AMERICAN INSURANCE**

**Chancery Court for Madison County  
No. 65767**

---

**No. W2009-01349-WC-R3-WC - Filed March 31, 2010**

---

**ORDER**

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Zurich American Insurance Company, and its surety, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM